Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1868

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ATLANTIC RICHFIELD CO.,

Petitioner,

—against—

INTERSTATE OIL TRANSPORT CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Statement Pursuant to Rule 28.1

Respondent, Interstate Oil Transport Co., was renamed Sonat Marine Inc. Sonat Marine Inc. is a subsidiary of Sonat Inter-ocean Transportation Company, which in turn is wholly owned by Sonat Inc. Affiliated companies are:

Interstate Barge Co.
Interstate Water Carriers Co.
Interstate Marine Transport Co.
Gellenthin Bulk Transport Corp.
Tug Interstate Co.
Ocean 80 Co.
Inter-Cities Navigation Corporation
International Bulk Transportation Company
Sonat Marine (Maryland) Inc.
Boston Street Realty Corporation
International Bulk Transport Corporation
Tide 119 Co.
Ocean 192 Company
Ocean 210 Company
Ocean 262 Co.
Schuylkill Marine Corp.
Ocean 81 Co.
Mariner Towing Company
Gulf States Barge Co.
Gulf States Towing Co.
Interstate Tugboat Co.
Interstate Navigation Co.
Interstate Towing Co.

Counterstatement of Questions Presented

1. Should this Court grant a writ of certiorari to review a decision which (a) is not in conflict with any other federal or state court, (b) does not depart from the usual course of judicial proceedings, and (c) does not involve an important question of federal law?

2. Should this Court grant a writ of certiorari to review a determination of the Court of Appeals which reversed a District Court's decision on (a) a question of law involving the construction of a contract, and (b) on the ground that the District Court's decision that the notice of settlement given and the reasonableness of that settlement was clearly erroneous?

TABLE OF CONTENTS

PAGE

STATEMENT PURSUANT TO RULE 28.1 i

COUNTERSTATEMENT OF QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

POINT I—The petition should be denied as there exists no valid reason for granting it 3

POINT II—Arguments contained for the first time in a petition for writ of certiorari and not raised in the lower courts should not be considered by this Court 5

POINT III—The petition should be denied because the District Court's decision as to notice was clearly erroneous 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City, N.C.*, ____ U.S. ____, 105 S.Ct. 1504 (1985) 7

Dittmore-Freimuth Corp. v. *The United States*, 390 F.2d 664 (Ct. Cl. 1968) 6

Hunsaker v. *Commissioner of Internal Revenue Service*, 615 F.2d 1253 (9th Cir. 1980) 6

Rocket Industries, Inc. v. *Southern Tire and Supply, Inc., et al.* 706 F.2d 561 (5th Cir. 1983) 6

Rogers v. *Lodge*, 458 U.S. 613 (1982) 5

Windsor v. *McVeigh*, 93 U.S. 274 (1876) 4, 5

Rules:

Fed. R. Civ. P.:

Rule 52 ..... 4, 7

Rule 52(a) 3, 5, 6

Rule 58 3

RESPONDENT'S BRIEF IN OPPOSITION

Counterstatement of the Case

The United States District Court for the Southern District of New York held that sufficient notice was given by Atlantic Richfield Co., [hereinafter "petitioner"] to Interstate Oil Transport Co. [hereinafter "Interstate"] by virtue of a telephone call made by petitioner's New York lawyer to Interstate's lawyer in Philadelphia, the night before the settlement (29a of the Appendix).[1] Hence, petitioner needed only prove its potential liability as opposed to the actual liability to the party with whom it settled it, i.e. General American Transportation Company [hereinafter "American"].

The Court of Appeals, following the law prevailing in nearly all Circuits regarding notice in indemnity cases, reversed and held that such notice and a failure to tender the defense of the action violated equitable principles and failed to satisfy due process requirements (10a and 16a).

Before the telephone notice of the settlement was given, petitioner never asserted any claim for indemnity against Interstate (8a). The only claim ever asserted against Interstate by petitioner was a claim based upon a cargo loss sustained by petitioner as a result of the casualty (7a, 8a, 45a). This claim for cargo loss was discontinued by Order dated May 12, 1977 (52a) without prejudice to petitioner's right to bring suit on this claim upon the conclusion of its litigation against American (7a, 52a). Therefore, petitioner's allegation (10) that the Court precluded petitioner from asserting an indemnity claim against Interstate until the prior action was concluded is misleading.

In holding Interstate was potentially liable to petitioner, the District Court stated that a provision in the lease between petitioner and American rendered petitioner liable to American.

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[1]All references are to pages in the petition.

The lease provision,[2] which the District Court held made petitioner an insurer of American (drafted by American), expressly provided that petitioner was not liable for any damages arising out of the lack of due care by American.

The District Court specifically held that American, the facility owner, and Interstate were both negligent in causing the damage (21a, 36a). In rendering its opinion, it specifically rejected any other basis of liability of petitioner to American (24a, 35a), i.e. that petitioner was in any way liable for the alleged negligence of Interstate and incorrectly held that petitioner was potentially liable to American, based solely on that lease provision (28a, 29a).

The Court of Appeals held that because adequate notice was not given nor defense of the action tendered by petitioner to Interstate that actual not potential liability on the part of petitioner to American had to be shown (16a).

The Court of Appeals then determined on its construction of the lease provision that not even potential liability existed. The Court of Appeals, in construing the lease provision, held that, since American was a co-tortfeasor with Interstate, petitioner, as a matter of law, had no liability, potential or actual, to American (21a). Hence, since the dismissal was based on a question of law, i.e. the construction of a lease provision, petitioner's argument concerning the Court of Appeals' reversal on the clearly erroneous doctrine involves dicta and is therefore inapposite.

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[2]"Lessee [Petitioner] *shall exonerate, indemnify and save harmless Lessor [American] from and against any liability* for damage of the property of Lessee, Lessor or others, liability for injury (including death) to persons (including employees of Lessor) and all claims or actions in connection with such damage, based upon, arising out of or occurring in connection with the deposit or withdrawal of Lessee's material, *except such claims as arise out of Lessor's failure to use reasonable care in the safekeeping and handling of the Lessee's commodities or property.*" (emphasis added)

The petitioner claims (8) that the Court of Appeals' reversal was based on that Court's erroneous reading of the settlement agreement between Interstate and American. Petitioner suggests that the Court of Appeals interpreted the settlement agreement differently than the District Court. Both the District Court and the Court of Appeals, however, made identical findings concerning that agreement (18a, 32a, fn. 6). No disagreement therefore exists between the Courts on this point.

Throughout, the petitioner contends that the Order signed by Judge Conner (47a-49a), settling the action between petitioner and American contains "findings of fact". This is not so. Judge Conner's comment that "ARCO [petitioner] may be responsible to defendant GATX [American] for any negligence on the part of Interstate [respondent]" (48a) does not rise to the level of a finding of fact. Fed. R. Civ. P. 52(a) and 58.

POINT I

The petition should be denied as there exists no valid reason for granting it.

The case sub judice was dismissed by the Court of Appeals on a pure question of law, i.e. the construction of a provision in a lease agreement entered into by petitioner and American. The lease provision expressly excluded any liability of petitioner to American if American was negligent. The District Court held that both American and Interstate were at fault in causing the casualty. The Court of Appeals held, in light of this evidence, petitioner failed to show even potential liability under the lease provision. Ergo, petitioner coult not be indemnified by a subsequent suit brought against Interstate for the amount of said settlement. The Court of Appeals thereupon dismissed the case.

Notwithstanding the clear dismissal by the Court of Appeals on a pure question of law, the petitioner asserts a "red herring"

argument, i.e. the Court of Appeals' alleged violation of Rule 52, Fed. R. Civ. P.

The petitioner claims that the Court of Appeals disregarded the findings of two trial courts that a settlement agreement was reasonable. This is not so. In entering an order settling the case between petitioner and American, Judge William C. Conner stated that the settlement was fair and reasonable. The Court of Appeals held that this "finding" of Judge Conner and its adoption by Judge Broderick was erroneous because Interstate was entitled to and did not receive adequate notice or an opportunity to be heard on the matter (22a).

Furthermore, the "finding" of reasonableness should not have been adopted by Judge Broderick. See, *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876), where this Court held:

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. *A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.*
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered." (emphasis added)

The claim is further made by petitioner that the settlement order entered by Judge Conner, which respondent was neither a party to nor present at, should be reviewed under the clearly erroneous standard of Rule 52(a) Fed. R. Civ. P.

It is submitted that Rule 52(a) of the Fed. R. Civ. P. applies only to findings made after a full trial. Rule 52(a) states specifically that it applies, "In all actions tried upon the facts without a jury . . .". The settlement order of Judge Conner does not fall within purview of the Rule. "Findings" by a Court in a settlement order are not findings under Rule 52(a). Under no circumstances could such a "finding" bind a non-party. *Windsor* v. *McVeigh, supra.*

Rogers v. *Lodge,* 458 U.S. 613 (1982), cited by petitioner, is inapposite because that case did involve findings made after trial. As stated above, there were no findings following a complete trial in the instant case.

Rule 17 of the Rules of the Supreme Court of the United States sets forth the character of reasons to be considered by the Court in granting a petition for a writ of certiorari. While the stated criteria are not all inclusive, they establish the type of case which this Court should review. The instant petition fits neither the text nor the spirit of Rule 17.

POINT II

Arguments contained for the first time in a petition for writ of certiorari and not raised in the lower courts should not be considered by this Court.

Petitioner now alleges (10) that it was precluded by an order of District Judge Sylvester J. Ryan (51a-53a), which settled the limitation proceeding, from asserting any claim against Interstate until the action between petitioner and American was concluded,

intimating that the action that was precluded was the one for indemnity against Interstate. This allegation, as noted in Interstate's counterstatement, is grossly misleading because the action referred to in the order of Judge Ryan was a cargo claim (52a). That was the only claim ever asserted by petitioner against Interstate prior to the instant action (8a).

This argument was never raised at the District Court level or in the Court of Appeals. Hence, it cannot be raised now. *Rocket Industries, Inc.* v. *Southern Tire and Supply, Inc., et al.* 706 F. 2d 561, 564 (5th Cir. 1983); *Hunsaker* v. *Commissioner of Internal Revenue Service,* 615 F.2d 1253, 1259 (9th Cir. 1980).

POINT III

The petition should be denied because the District Court's decision as to notice was clearly erroneous.

There is ample authority that adequacy of notice is a question of law, *Dittmore-Freimuth Corp.* v. *The United States,* 390 F.2d 664, 684 (Ct. Cl. 1968). Although questions of law are not subject to the stringent standard of review under Rule 52(a) Fed. R. Civ. P., the Court of Appeals nonetheless applied that standard pursuant to that Rule.

Assuming arguendo, that the District Court's holding concerning the adequacy of notice of settlement given Interstate by petitioner presented a question of fact rather than one of law and thus subject to the clearly erroneous standard on review, the Court of Appeals applying that standard, (16a) nonetheless, held that the District Court had clearly erred.

The District Court concluded that the following "facts" constituted fair and adequate notice of the settlement:

1. The night prior to the settlement between petitioner and American, petitioner, for the first and only time, notified

Interstate of the settlement agreement as well as informing Interstate that it would bring a claim based on indemnification against them (8a and 29a).[3]

2. At that time the defense of the action was not tendered to Interstate (8a and 29a).

The Court of Appeals, however, held that the District Court's decision that notice of settlement to Interstate was adequate was clearly erroneous (16a).

The petitioner further erroneously contends that the Court of Appeals' decision violated the 1985 amendment to Rule 52 Fed. R. Civ. P. as well as the doctrine enunciated by this Court in *Anderson* v. *City of Bessemer City, N.C.*, _____ U.S. _____, 105 S.Ct. 1504 (1985).

However, the Court of Appeals was well aware of the Supreme Court's construction of Rule 52(a) in *Anderson* v. *City of Bessemer City, N.C., supra,* because it cited that case in its opinion when it held, ". . . the district court's finding that Atlantic's overnight notice to Interstate was adequate is clearly erroneous . . ." (16a).

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[3]*No dispute* concerning the facts surrounding notice to Interstate exists between the Court of Appeals and the District Court. Both Courts agreed that Interstate received notice of settlement the evening before settlement and that petitioner never tendered the defense to Interstate.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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